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TAN SRI DATO' TAJUDIN RAMLI v. REGO MULTI-TRADES SDN BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
YAACOB MD SAM JCA
B YEOH WEE SIAM JCA
[CIVIL APPEAL NO: W-02(W)-1232-17-2016]
9 FEBRUARY 2018

C ***COMPANY LAW:*** *Directors – Breach of fiduciary duties – Whether director acted in good faith in procuring company's entry into investment management agreement with fund manager – Whether director misled company – Whether director attempted to verify financial viability of fund manager – Whether background checks done before signing of investment management agreement – Whether company suffered losses*

D ***COMPANY LAW:*** *Directors – Breach of fiduciary duties – Letter of indemnity – Validity – Whether director intended to indemnify company – Whether director expressly undertook in personal capacity to make good any losses suffered by company – Whether letter of indemnity a legally binding and enforceable document – Whether letter of indemnity supported by valid considerations*

E ***COMPANY LAW:*** *Separate legal entity – Board of directors – Whether holding company and subsidiary company separate legal entities – Board of directors' resolution of holding company discharging director's obligations under letter of indemnity – Whether holding company could write off debts of subsidiary company – Whether waiver of director's obligation under letter of indemnity at holding company's board of directors' meeting invalid – Whether board resolution of parent or holding company binding on subsidiary company*

F

Rego Multi-Trades Sdn Bhd ('respondent') entered into an investment management agreement to engage the first defendant ('Aras Capital') as its
G fund manager. The second defendant ('the appellant'), a former director and substantial shareholder of the respondent, was one of the authorised persons to negotiate and finalise the terms of the investment management agreement and any other agreements supplemental thereto ('the IMAs'). Between 14 January 1997 to 28 April 1997, the respondent deposited with Aras Capital a total aggregate sum of RM277.33 million. On 12 December 1997,
H the Securities Commission revoked Aras Capital's licence as a fund manager and consequently, Aras Capital no longer had the requisite licence to manage the respondent's investments under the IMAs. In the course of conducting the audit for the financial year, the respondent's auditors queried the recoverability of the placements with Aras Capital for the purpose of their
I classification in the accounts. In order to avoid the placements to be classified as bad or doubtful debts, the appellant issued a letter of indemnity

('LOI') to the respondent to make good any such losses that the respondent might suffer as a result of Aras Capital's default under the IMAs. At the holding company Technology Resources Industries Berhad's ('TRI') Board of Directors' Meeting ('BOD'), it was resolved that TRI accepted the appellant's proposed payment of RM100 million as full and final settlement of the appellant's personal guarantee under the LOI and that TRI was to provide for write off of the remaining RM185 million due from Aras Capital in TRI's accounts for the financial year. The respondent received payments in respect of and on account of Aras Capital's obligations under the IMAs in the sum of RM110 million. However, the respondent contended that the outstanding balance remained due and payable by Aras Capital and the appellant, under the IMAs and pursuant to the LOI. The respondent issued letters of demand to Aras Capital and the appellant but both parties failed, neglected and/or refused to make payment. Thus, the respondent's claim against the appellant premised on the LOI in the sum of RM264,525,889.25 and/or damages for the appellant's breach of his statutory duties and/or fiduciary duties owed to the respondent. The appellant filed a defence and counterclaim against, *inter alia,* the respondent and TRI, contending that his liabilities and obligations under the LOI had been discharged. The appellant also sought a declaration that the LOI was void and ought to be rescinded and for damages premised on conspiracy to injure. Both the respondent and TRI further filed a counterclaim to the appellant's counterclaim for a declaration that the TRI's BOD resolution did not and could not amount to the valid and effective release of the appellant's liabilities and obligations under the LOI and that there was no valid and effective release by TRI and the respondent of the appellant's liabilities and obligations under the LOI. The High Court held that (i) the appellant had breached his fiduciary, statutory and common law duties as a director, amongst others, in procuring the respondent's entry into the IMAs with Aras Capital; and (ii) that the waiver of the appellant's obligation under the LOI at the TRI BOD meeting was invalid. Hence, this appeal by the appellant.

Held (dismissing appeal; affirming decision of High Court)
Per Yeoh Wee Siam JCA delivering the judgment of the court:

(1) The appellant, in causing the respondent to enter into the IMAs with Aras Capital, was not acting in good faith. The appellant's evidence was that he had made the placement with Aras Capital because of the instruction from the Government to support the share market. However, there was no cogent evidence of any such instruction by the Government. Even if there was such an instruction from the Government to the appellant to support the share market, investing in Aras Capital at the instruction of the Government was outside the objectives as set out in the respondent's memorandum and articles of

association. The appellant had not made full and frank disclosure or mention of the purported Government instruction in the circular resolution which dealt with the IMAs. Therefore, the appellant had misled the respondent's BOD from making an informed decision in relation to the entry of the IMA. (paras 32 & 33)

(2) The appellant was in breach of his duty of loyalty to the respondent when he committed substantial funds owned by the respondent to third parties. There was no evidence that the appellant had made any attempt to verify the financial viability of Aras Capital, or to monitor the placements in Aras Capital. The appellant did not verify the alleged representation by one Hj Ishak that Aras Capital was a licenced fund management company with a reputable entity. It was doubtful whether any background checks were done on Aras Capital before the signing of the IMAs. The appellant had breached his fiduciary duties as a director of the respondent and had caused the respondent's losses as claimed. The respondent had filed this suit as it viewed seriously its losses. (paras 34, 44 & 49)

(3) From the plain and ordinary meaning of the LOI, it was the appellant's intention to indemnify the respondent in the event that Aras Capital defaulted in its payment. It was crystal clear from the words in the LOI where the appellant expressly undertook in his personal capacity 'to make good any such losses that the Rego might suffer in the event of any delay/default in payment of the principal sum and expected returns deem to be accruing to Rego from Aras Capital pursuant to the agreements entered.' The LOI was not merely a comfort letter which was not intended to be binding. The LOI was intended to be a legally binding and enforceable document. The LOI was supported by valid considerations and was therefore enforceable by the respondent against the appellant. (paras 59 & 60)

(4) TRI, as a holding company, and its wholly owned subsidiary company, the respondent, were separate legal entities. A board resolution of a parent or holding company could not bind a subsidiary or wholly owned company of that parent or holding company. Thus, the directors must approach their duties as directors who recognise the separate legal personality of the two entities. Therefore, the TRI BOD resolution did not bind the respondent. The holding company, TRI, could not simply write off the debts of its subsidiary company, the respondent, *ie*, for the amount due to the respondent from Aras Capital. By the fact that the respondent had filed this action against Aras Capital and the appellant, it was ample proof that the respondent thought otherwise from TRI, and sought to recover all its losses through this claim. As far as the respondent was concerned, the amount due from Aras Capital and the appellant was never written off, and therefore must be recovered. (paras 65-67)

(5) There had been no settlement of any sort reached by the respondent regarding this dispute that would bind the respondent to withdraw its claims against the appellant. The appellant had failed to establish his counterclaim on a balance of probability. Further, there were no appealable errors in fact or in law which warranted appellate intervention. (paras 75 & 76)

Bahasa Malaysia *Headnotes*

Rego Multi-Trades Sdn Bhd ('responden') memasuki satu perjanjian pengurusan pelaburan untuk melantik defendan pertama ('Aras Capital') sebagai pengurus dananya. Defendan kedua ('perayu') seorang bekas pengarah dan pemegang saham responden, adalah salah seorang yang diberi kuasa untuk berunding dan menyelesaikan terma-terma perjanjian pengurusan pelaburan dan apa-apa perjanjian tambahan ('IMAs'). Antara 14 Januari 1997 hingga 28 April 1997, responden mendepositkan dalam Aras Capital jumlah agregat keseluruhan RM277.33 juta. Pada 12 Disember 1997, Suruhanjaya Sekuriti membatalkan lesen Aras Capital sebagai pengurus dana dan akibatnya, Aras Capital tidak lagi mempunyai lesen yang diperlukan untuk mengurus pelaburan responden bawah IMAs. Semasa menjalankan audit untuk tahun kewangan itu, juruaudit-juruaudit responden menyoal kebolehpulihan penempatan dengan Aras Capital bagi tujuan klasifikasi akaun. Bagi mengelak penempatan diklasifikasikan sebagai hutang lapuk atau sangsi, perayu mengeluarkan surat tanggung rugi ('LOI') untuk melunaskan janji membayar apa-apa kerugian yang dialami responden akibat keingkaran Aras Capital bawah IMAs. Dalam Mesyuarat Lembaga Pengarah ('Lembaga Pengarah') syarikat induk Technology Resources Industries Berhad ('TRI') diputuskan bahawa TRI menerima cadangan bayaran RM100 juta oleh perayu sebagai penyelesaian muktamad dan penuh jaminan peribadi perayu bawah LOI dan TRI akan menyediakan penghapusan jumlah RM185 juta yang masih dihutang Aras Capital dalam akaun TRI untuk tahun kewangan itu. Responden menerima bayaran atas obligasi Aras Capital bawah IMAs dalam jumlah RM110 juta. Walau bagaimanapun, responden menghujahkan bahawa jumlah yang belum dijelaskan kekal terhutang dan perlu dibayar oleh Aras Capital dan perayu, bawah IMAs dan menurut LOI. Responden mengeluarkan surat tuntutan kepada Aras Capital dan perayu tetapi kedua-dua pihak gagal, cuai dan/atau enggan membuat bayaran. Oleh itu, responden membuat tuntutan terhadap perayu berdasarkan LOI dalam jumlah RM264,525,889.25 dan/atau ganti rugi untuk pelanggaran kewajipan statutori dan/atau kewajipan fidusiari perayu kepada responden. Perayu memfailkan pembelaan dan tuntutan balas terhadap, antara lain, responden dan TRI, dengan hujahan bahawa liabiliti dan tanggungjawabnya bawah LOI telah dilupuskan. Perayu juga menuntut pengisytiharan bahawa LOI adalah tidak sah dan dibatalkan dan untuk ganti rugi berdasarkan konspirasi untuk

merosakkan. Kedua-dua responden dan TRI juga memfailkan tuntutan balas terhadap tuntutan balas perayu untuk pengisytiharan bahawa Resolusi Lembaga Pengarah TRI tidak berjumlah pada pelepasan sah dan berkesan liabiliti-liabiliti dan tanggungjawab-tanggungjawab perayu bawah LOI. Mahkamah Tinggi memutuskan bahawa (i) perayu telah melanggar kewajipan fidusiari, statutori dan common law sebagai pengarah, antara lain, dalam memperolehi kemasukan responden dalam IMAs dengan Aras Capital; dan (ii) bahawa penepian obligasi perayu bawah LOI di mesyuarat Lembaga Pengarah TRI adalah tidak sah. Oleh itu, rayuan ini oleh perayu.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)

Oleh Yeoh Wee Siam HMR menyampaikan penghakiman mahkamah:

(1) Perayu, dalam menyebabkan responden memasuki IMAs dengan Aras Capital, tidak bertindak dengan niat baik. Keterangan perayu adalah bahawa dia telah membuat penempatan dengan Aras Capital atas arahan Kerajaan untuk menyokong pasaran saham. Walau bagaimanapun, tiada keterangan kukuh berkenaan apa-apa arahan daripada Kerajaan. Jikapun terdapat arahan Kerajaan kepada perayu untuk menyokong pasaran saham, pelaburan dalam Aras Capital atas arahan Kerajaan adalah di luar objektif yang dibentangkan dalam memorandum dan tataurusan persatuan. Perayu tidak membuat pendedahan penuh dan terus terang atau menyentuh arahan Kerajaan dalam resolusi pekeliling yang menangani IMAs. Oleh itu, perayu telah mengelirukan Lembaga Pengarah responden daripada membuat keputusan yang betul berhubungan kemasukan IMAs.

(2) Perayu telah melanggar kewajipannya untuk taat kepada responden apabila dia mengikatkan dana cukup banyak milik responden kepada pihak ketiga. Tiada keterangan menunjukkan bahawa perayu telah mencuba untuk mengesahkan liabiliti kewangan Aras Capital, atau memantau penempatan dalam Aras Capital. Perayu tidak mengesahkan representasi oleh seorang yang bernama Hj Ishak bahawa Aras Capital adalah syarikat pengurusan dana yang berlesen dengan entiti yang mempunyai reputasi baik. Adalah diragui sama ada apa-apa semakan latar belakang dilaksanakan ke atas Aras Capital sebelum IMAs ditandatangani. Perayu telah melanggar kewajipan fidusiarinya sebagai pengarah responden dan menyebabkan responden mengalami kerugian seperti yang didakwa. Responden memfailkan guaman ini kerana ia memandang berat kerugian yang dialaminya.

(3) Daripada maksud biasa dan jelas LOI, adalah niat perayu untuk menanggung rugi responden sekiranya Aras Capital gagal membuat bayaran. Amat jelas sekali daripada perkataan-perkataan dalam LOI di mana perayu telah, dengan nyata, menanggung dalam kapasiti

peribadinya 'untuk melunaskan pembayaran apa-apa ganti rugi yang dialami Rego sekiranya terdapat kelewatan/keingkaran membuat bayaran jumlah pokok dan pulangan dijangka dianggap sebagai terakru kepada Rego daripada Aras Capital menurut perjanjian-perjanjian yang dimasuki.' Surat tanggung rugi bukanlah surat untuk mententeramkan yang tiada tujuan mengikat. Surat tanggung rugi bertujuan untuk menjadi dokumen mengikat secara sah dan boleh dikuatkuasakan. Surat tanggung rugi disokong oleh pertimbangan-pertimbangan yang sah dan dengan itu boleh dikuatkuasakan oleh responden terhadap perayu.

(4) TRI, sebagai syarikat induk, dan anak syarikat milik penuhnya, responden, adalah entiti undang-undang yang berbeza. Resolusi Lembaga syarikat induk tidak mengikat syarikat subsidiari atau syarikat milik penuh syarikat induk itu. Oleh itu, pengarah-pengarah harus melaksanakan kewajipan mereka sebagai pengarah yang mengiktiraf personaliti perundangan berasingan kedua-dua entiti itu. Oleh itu, resolusi Lembaga Pengarah TRI tidak mengikat responden. Syarikat induk, TRI, tidak boleh semata-mata menghapuskan hutang syarikat subsidiarinya, iaitu responden, jumlah yang perlu dibayar kepada responden dari Aras Capital. Melalui fakta bahawa responden memfailkan tindakan ini terhadap Aras Capital dan perayu, adalah bukti yang memadai bahawa responden berfikir sebaliknya dari TRI, dan menuntut untuk memulih semua kerugiannya melalui tuntutan ini. Menurut responden, jumlah yang perlu dibayar oleh Aras Capital dan perayu tidak boleh dihapuskan, dan dengan itu, harus dipulih.

(5) Tiada apa-apa penyelesaian pun dicapai oleh responden berkenaan pertikaian ini yang boleh mengikat responden untuk menarik balik tuntutan-tuntutannya terhadap perayu. Perayu gagal membuktikan tuntutan balasnya atas imbangan kebarangkalian. Tambahan lagi, tiada kekhilafan rayuan dari segi fakta atau undang-undang yang mewajarkan campur tangan rayuan.

Case(s) referred to:

Adams v. Cape Industries Plc [1990] BCLC 479 ***(refd)***

Akatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Networks Systems (M) Sdn Bhd) v. Solid Investment Ltd [2012] 4 MLJ 72 ***(refd)***

Artic Building and Civil Engineering Sdn Bhd v. Ahmad Zazi Sdn Bhd & Ors [2009] 1 LNS 403 HC ***(refd)***

Hotel Anika Sdn Bhd v. Majlis Daerah Kluang Utara [2006] 4 CLJ 981 HC ***(refd)***

Lewis Holding Ltd v. Steel & Tube Holdings Ltd [2015] 2 NZLR 83 ***(refd)***

Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors [2015] 8 CLJ 856 CA ***(refd)***

Simmah Timber Industries Sdn Bhd v. David Low See Keat & Ors [1999] 1 LNS 14 HC ***(refd)***

Tan Joo Chai & Anor v. Eco Water Technologies (M) Sdn Bhd [2015] 3 CLJ 929 CA ***(refd)***

Thueringische Faser Aktiengesellschaft Schwarza v. Bank Of Commerce (M) Bhd [2009] 4 CLJ 102 HC ***(refd)***

Legislation referred to:
Companies Act 1965 (since repealed), ss. 132(1), (1A)(b), (2)
Companies Act 2016, s. 213(2)(b)
Contracts Act 1950, s. 77

Other source(s) referred to:
Halsbury's Laws of England, 5th edn, 2009, vol 14, para 302
Walter Woon on Company Law, 3rd edn, para 2.36, p 51

For the appellant - Lim Kian Leong, Janet Tang Yii Chi & Tobias Lim; M/s Lim Kian Leong & Co
For the respondent - Rabindra S Nathan, Nad Segaram, Soo Siew Mei & Siew Huei Ira; M/s Shearn Delamore & Co

[Editor's note: For the High Court judgment, please see Rego Multi-trades Sdn Bhd v. Aras Capital Sdn Bhd & Anor [2017] 1 LNS 800 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Yeoh Wee Siam JCA:

Appeal

[1] This is an appeal by Tan Sri Dato' Tajudin bin Ramli ("appellant" or "second defendant") against the decision of the Kuala Lumpur High Court ("High Court") dated 20 June 2016 given after a full trial when the High Court entered judgment against the second defendant in the sum of RM264,525, 889.77 with interest at 5% from the date of the amended writ dated 13 May 2013, and dismissed the second defendant's counterclaim with costs.

Background Facts

[2] We now restate the following background facts as set out in the grounds of judgment of the High Court.

Introduction

[3] The plaintiff's claim against the second defendant is premised on a letter of indemnity dated 1 April 1998 (the "LOl") in the sum of RM264,525,889.25 and/or damages for the second defendant's breach of his statutory duties and/or fiduciary duties owed to the plaintiff.

[4] With regard to the plaintiff's claim against the first defendant, a judgment in default was entered against the first defendant on 30 July 2013 for the sum of RM264,525,889.77.

[5] The second defendant filed a defence and counterclaim dated 13 May 2005 against the following parties:

(i) the plaintiff Rego-Multi Trades Sdn Bhd ("plaintiff");

(ii) technology Resources Industries Berhad ("TRI");

(iii) Tan Poh Keat ("Tan");

(iv) Azzat bin Kamaludin ("Azzat");

(v) Bazlan bin Osman ("Bazlan");

(vi) Ismael Fariz bin Ali ("Ismael the deceased");

(vii) Mohamed Yunus Ramli bin Abbas ("Mohamed Yunus").

[6] In his defence and counterclaim, the second defendant contends that his liabilities and obligations under the LOI have been discharged and that the first and second defendants to the counterclaim had unlawfully allowed, permitted or caused a Bursa Malaysia announcement, press statement and/or newspaper article to be published in relation to the present suit and had used unlawful means to interfere with the trade and business of the second defendant. Therefore, the second defendant seeks a declaration that the LOI is void and be rescinded and for damages premised on conspiracy to injure.

[7] As against the third to the seventh defendants to the counterclaim, the second defendant grounded his claim on conspiracy in relation to the above contentions against the first and second defendants to the counterclaim.

[8] Both the plaintiff and TRI further filed a counterclaim to the second defendant's counterclaim for a declaration that the TRI's 80th Board of Directors (the "BOD" or "Board") Resolution dated 23 February 2000 did not and could not amount to the valid and effective release of the second defendant's liabilities and obligations under the LOI and that there is no valid and effective release by TRI and the plaintiff of the second defendant's liabilities and obligations under the LOI.

The Salient Facts

[9] The facts, as narrated by the parties in their written submissions, established that the plaintiff in the original action, and the first defendant to the counterclaim, is a wholly owned subsidiary of ("TRI"), the second defendant to the counterclaim.

[10] The first defendant ("Aras Capital") in the original action, was a private company dealing with investment management.

[11] The second defendant in the original action, was a former director of the plaintiff and also a substantial shareholder, the former Chairman and the Chief Executive of TRI at all material times.

[12] TRI, the second defendant to the counterclaim, is the holding company of the plaintiff and wholly-owned subsidiary of Celcom Axiata Berhad ("Celcom") which in turn is a wholly-owned subsidiary of Axiata Group Berhad ("Axiata"). TRI's principal activities are that of investment holding and provision of management services.

[13] The third to seventh defendants to the counterclaim were and/are directors of the plaintiff and/or TRI, as the case may be.

[14] Pursuant to the plaintiff's Directors' Circular Resolution No. 02-97 on 10 January 1997, the plaintiff has entered into an Investment Management Agreement ("the IMA") to engage Aras Capital as its fund manager. The second defendant was one of the authorised persons to negotiate and finalise the terms of the IMA and any other agreements supplemental thereto.

[15] Under the terms and conditions of the IMA, the plaintiff was to place a sum of up to RM200 million with Aras Capital for the purpose of investment and Aras Capital guaranteed a minimum rate of return of 2% per annum above Malayan Banking Berhad's ("MBB") one month fixed deposit rate.

[16] On 21 April 1997, the plaintiff entered into a Supplemental Investment Management Agreement ("the Supplemental IMA") with Aras Capital to increase the amount of placements under the IMA by RM100 million and the guaranteed rate of return was revised to a return of no less than MBB's fixed deposit rate for one month placement based on the then subsisting rate of return. The Supplemental IMA was in effect to supersede the original IMA (referred to as the "IMAs").

[17] Between 14 January 1997 and 28 April 1997, the plaintiff had deposited with Aras Capital a total aggregate sum of RM277.33 million.

[18] On 12 December 1997, the Securities Commission revoked Aras Capital's licence as a fund manager. Consequently, Aras Capital no longer had the requisite licence to manage the plaintiff's investments under the IMAs.

[19] In the course of conducting the audit of the TRI Group for the financial year ended 31 December 1997, Messrs Arthur Andersen & Co (the "auditors"), who were the plaintiff's auditors at that time, queried the recoverability of the placements with Aras Capital for the purpose of their classification in the accounts.

[20] In order to avoid the placements to be classified as bad or doubtful debts, the second defendant issued the LOI to the plaintiff on 1 April 1998. The LOI is to make good any such losses that the plaintiff might suffer as a result of Aras Capital's default under the IMAs by 31 March 1999. In the

said LOI, the second defendant acknowledged that as of 31 December 1997 the total sum of the placements by the plaintiff with Aras Capital was RM277.3 million.

[21] At TRI's 80th BOD Meeting (No. 01-00) on 23 February 2000, it was resolved that TRI accepted the second defendant's proposed payment of RM100 million as full and final settlement of the second defendant's personal guarantee under the LOI and that TRI was to provide for write-off of the remaining RM185 million due from Aras Capital in TRI's accounts for the financial year ended 31 December 1999.

[22] The plaintiff received payments in respect of and on account of Aras Capital's obligations under the IMAs in the sum of RM110 million.

[23] However, the plaintiff contends that the outstanding balance remains due and payable by Aras Capital and the second defendant, under the IMAs and pursuant to the LOI, amounting to RM264,525,889.77.

[24] The plaintiff, through its solicitors, issued letters of demand to Aras Capital and the second defendant on 27 February 2003 and 29 December 2004, but Aras Capital and the second defendant however failed, neglected and/or refused to make payment of the said sum.

[25] Subsequent to the filing of this action, Aras Capital was wound up by an order of court on 27 May 2005 *vide* Kuala Lumpur High Court Winding Up Petition No: D7-28-145-2005. A judgment in default was entered against Aras Capital on 30 July 2013.

Decision By The High Court

[26] In brief, regarding the plaintiff's claim, the High Court made the following decision on the two primary issues before the court:

(i) that the second defendant has breached his fiduciary, statutory and common law duties as a director, amongst others, in procuring the plaintiff's entry into the IMAs with the first defendant, Aras Capital; and

(ii) that the waiver of the second defendant's obligation under the LOI at the TRI BOD Meeting on 23 February 2002 was invalid.

[27] Regarding the second defendant's counterclaim, since the second defendant opted not to give evidence, the High Court held that the second defendant has failed to establish his case in the counterclaim.

Our Decision

Regarding The Plaintiff's Claim

Breach Of Fiduciary Duties

[28] As to the issue of breach of fiduciary duty, the learned judge relied on the following to find such a breach:

(a) that the appellant did not act in the best interests of the respondent when he acted in accordance with the instructions of the Government to support the share market;

(b) that the appellant was negligent;

(c) that no honest and intelligent man would have believed such arrangements were for the benefit of the respondent;

(d) that the appellant caused the respondent to enter into the IMAs without proper verifications;

(e) that the appellant failed in his duty to supervise the arrangements under the IMAs and to ensure adequate internal controls were in place to supervise.

[29] The question is whether there is a breach by the appellant, ie, the second defendant, of his fiduciary, statutory and common law duties as a director of the respondent, ie, the plaintiff, by causing the respondent to enter into the IMAs with Aras Capital, and that accordingly the appellant is liable to compensate the respondent the remainder of the monies that were placed with Aras Capital and which have not been recovered, and also the interest thereon in accordance with the relevant interest rates under the IMAs.

[30] The appellant was the CEO and Chairman of TRI at the material time. The appellant submits that there was no allegation or evidence of fraud or dishonesty against the respondent. There was also no allegation or evidence of his conflict of interest. In the normal course, the appellant would not be expected to micro manage matters. Once the decision to invest had been made by the Board, the appellant left it to the managers to follow up. This is the normal practice for a CEO and Chairman of a large corporation. Therefore, there was no breach of fiduciary duty by the appellant especially since he was extremely busy with the huge corporate and financial restructuring of the TRI Celcom Group at that time. The appellant further submits that the decision to invest was made by the Board, and not by the appellant alone. He signed the agreement pursuant to a BOD Resolution authorising him to do so, and he was not on a frolic of his own.

[31] It is trite law that a director owes fiduciary duties to the company (see *Simmah Timber Industries Sdn Bhd v. David Low See Keat & Ors* [1999] 1 LNS 14; [1999] 5 MLJ 421, and *Akatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Networks Systems (M) Sdn Bhd) v. Solid Investment Ltd* [2012] 4 MLJ 72 at p. 82).

[32] In this case, we agree with the learned High Court Judge ("judge") and the submissions of the respondent that the appellant, in causing the respondent to enter into the IMAs with Aras Capital, was not acting in good faith. The appellant's evidence is that he had made the placement with Aras Capital because of the instruction from the Government to support the share market. However, it is clear that before the High Court there was no cogent evidence of any such instruction by the Government. In any case, the judge is correct to hold that even if there was such an instruction from the Government to the appellant to support the share market, investing in Aras Capital at the instruction of the Government was outside the objects as set out in the respondent's Memorandum and Articles of Association.

[33] It is also to be noted that the appellant, as a director of the respondent, made no full and frank disclosure or mention of the purported Government instruction in the Circular Resolution No. 02-97 which dealt with the IMAs. Therefore, in our view, the judge is correct in her finding that the appellant had in fact misled the respondent's BOD from making an informed decision in relation to the entry of the IMA.

[34] We do not think that the appellant can avoid liability by contending that he is a busy CEO and cannot be expected to micro manage everything. The High Court made a finding that the appellant was in breach of his duty of loyalty to the respondent when he committed substantial funds owned by the respondent to third parties. There is no evidence that the appellant made any attempt to verify the financial viability of Aras Capital, or to monitor the placements in Aras Capital.

[35] The judge considered ss. 132(1) and 132(1A) of the Companies Act 1965 ("CA 1965") which, *inter alia*, provide for the statutory duties of a director as follows:

> (1) A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company.
>
> (1A) A director of a company shall exercise reasonable care, skill and diligence with:
>
> (a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and
>
> (b) any additional knowledge, skill and experience which the director in fact has.

[36] Section 132(2) of the same Act clearly spells out the prohibition against improper use of the company's property:

> (2) A director or officer of a company shall not, without the consent or ratification of a general meeting:
>
> (a) use the property of the company;
>
> (b) use any information acquired by virtue of his position as a director or officer of the company;
>
> (c) use his position as such director or officer;
>
> (d) use any opportunity of the company which he became aware of, in the performance of his functions as the director or officer of the company; or
>
> (e) engage in business which is in competition with the company,
>
> to gain directly or indirectly, a benefit for himself or any other person, or cause detriment to the company.

[37] The appellant went on the basis that a director must use all the knowledge available to him from his own experience and knowledge and not just knowledge available to a reasonable man. The requirement for a director to use his special knowledge is provided in s. 132(1A)(b) of the CA 1965 (now s. 213(2)(b) of the Companies Act 2016) (see para. [35] above).

[38] The appellant cited the case of see *Tan Joo Chai & Anor v. Eco Water Technologies (M) Sdn Bhd* [2015] 3 CLJ 929; [2015] 3 MLJ 380 where the Court of Appeal held as follows:

> [12] We endorse the statement extracted from the book '*The Companies Act of Malaysia An Annotation'* by Walter Woon & Andrew Hicks and reproduced in the judgment of the High Court that:
>
> … This is judicial recognition of the fact that different people can have different opinions about what is good for a company and in its interests. Directors may take risks with the company's property where they honestly believe that to do so is in the company's interest: *Cheam Tat Pang v. PP* [1996] 1 SLR 541, 561 (High Court, Singapore). This is indeed the essence of entrepreneurship. Just because a director makes a wrong decision does not mean that he breached his fiduciary duty to the company. **The above dicta imply that the test is subjective and that the courts will not interfere in a management decision.**
>
> [13] Doing business is not for the naïve. It is trite that doing business always involves an element of risk. It is equally trite that the cost of eliminating all risk may well result in no profit left to be made. **The fiduciary duties of directors are not so naively constructed that they are not only duty bound to take no risk, eliminate all risks but also must only ensure profits.** Nor it is intended that the courts should become forums of appeal in business decisions. (emphasis added)

[39] The appellant submits that he operated at the very highest levels and would be expected to have special knowledge and expertise not available to the ordinary man. Thus, his testimony that refusal to follow the directions of the Government would have exposed TRI to serious repercussions which far outweighed the financial risk of compliance should not have been dismissed out of hand by the learned judge.

[40] The appellant further submits that the learned judge overlooked the fact that the actual repercussions to the respondent in making the placements were not serious in the overall context, bearing in mind the size and success of the financial and corporate restructuring of TRI. There was no element of personal gain by the appellant. Thus, there was simply not enough evidence to point to a breach of fiduciary duty.

[41] In our view, the High Court correctly applied the objective test laid down by the Court of Appeal in *Petra Perdana Berhad v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* [2015] 8 CLJ 856 at 879 for determining the duty to act honestly under s. 132(1) of the CA 1965, namely whether an honest and an intelligent man in the position of a director of the company concerned could, in the whole of the material circumstances, have reasonably believed that the transactions were for the benefit of the company.

[42] We further agree with the High Court and the submissions of the respondent that the entry into the IMAs for the purpose of the share market support is not part of the objects of the respondent's Memorandum and Articles of Association. It is therefore not for a proper purpose for which the appellant's powers as a director of the respondent was conferred. As correctly decided by the judge, the appellant should have acted in the best interests of the respondent, and not for any collateral purpose. The appellant contends that he had acted in accordance with the purported instruction from the Government to participate in the purported share market support. However, in our view, this was without regard to the best interests of the respondent. It is therefore a clear act of breach of the statutory and/or common law duties of the appellant as a director of the respondent.

[43] The appellant admitted that when the share market continued to worsen, further substantial funds of the respondent were committed under the Supplemental IMA. We are of the considered opinion that the judge is not wrong to hold that, as an intelligent and honest man in the position of a director of the respondent, the appellant surely would not have reasonably believed that such an arrangement was for the benefit of the respondent.

[44] From the totality of the evidence adduced, it is clear that the appellant had acted in breach of his duties as director of the respondent when he executed the IMAs without proper verification. He did not verify the alleged representation by one Datuk Hj Ishak that Aras Capital was a licensed fund

management company, and whether Aras Capital was a reputable entity. The judge was also doubtful whether any due diligence was carried out on Aras Capital such as background checks and its performance as a fund manager, before signing the IMA, and whether anyone did in fact check if the funds were placed with a financial institution. There was no evidence that the appellant, or someone from TRI had monitored the placements with Aras Capital for the IMAs. The appellant could not confirm whether Aras Capital provided the respondent with monthly statements pursuant to cl. 7.1 of the IMA.

[45] Worse still, the appellant was totally unaware and did not know that Aras Capital licence as a fund manager was revoked on 12 December 1997.

[46] We note that the judge had fully considered the appellant's position that in 1997 the Asian Financial Crisis hit Malaysia and that the execution of the IMAs was necessary to comply with the Government's call to support the stock market, and that the Government's instruction could not be refused as the Group's telecommunication licences would have been at risk.

[47] We agree with the judge that there was no evidence to support the appellant's defence. The appellant did not call any crucial witness to explain the Government's call for market support, in particular Datuk Hj Ishak Ismail who purportedly had made the specific call to the appellant to place the investment with Aras Capital. No explanation was given by the appellant for not calling this person as a witness.

[48] We further agree with the High Court's observation that the appellant's share market scheme support theory cannot be accepted because the IMAs were entered in January and April 1997, but at that time the Asian Financial Crisis had not yet hit Malaysia. According to the Bank Negara Malaysia Annual Report 1997, the 1997 Asian Financial Crisis was triggered when the Thai Baht was floated on 2 July 1997. Thus, the appellant's explanation, that the request to place money with the stock market was a pre-emptive step by the Government and the Minister of Finance and so pre-dated the official start of the crisis, is not acceptable or even credible.

[49] Based on the findings of fact of the trial judge, we do not think that the judge had erred in any way to decide that the appellant had breached his fiduciary duties as a director of the respondent to cause the respondent's losses as claimed. It is evident from the fact that the respondent filed this suit that the respondent views seriously its losses even though TRI thinks that the repercussions of the appellant's actions are "not serious".

The Validity Of The LOI And The Waiver Made At The TRI BOD Meeting On 23 February 2002

[50] The appellant submits that the LOI (RR Jld 2(144) Bhg C p. 24096) is merely a letter of comfort and not enforceable. He says that the LOI was issued at the request of the auditors who relied on the LOI to issue a "clean" audit report for TRI and the respondent.

[51] According to the appellant, the LOI is not enforceable. There was no consideration received by the appellant from the respondent. In fact, the consideration of RM10 was paid to the respondent, and not to the appellant. The LOI was issued after the placements to Aras Capital had already been made. Hence, the respondent was not induced to make the placements nor to withhold taking action to recover them. There was no evidence of any benefit flowing to the appellant from the assurance of the LOI. In fact, the only benefit appeared to be to the respondent in that the auditors issued a "clean report". The respondent gave nothing, but gained from the LOI. Furthermore, Aras Capital was not even in default at the time when the LOI was issued. Thus, the LOI was issued to give comfort to the auditors, and cannot be enforced as a guarantee of indemnity.

[52] The question that was considered by the High Court is whether the LOI is a contract of indemnity. Section 77 of the Contracts Act 1950 describes a contract of indemnity as follows:

> A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity.

[53] We now examine the contents of the LOI to determine whether it is a contract of indemnity. The appellant's LOI dated 1 April 1998 reads as follows:

> On 10 January 1997, pursuant to the investment management agreement mentioned above, I acknowledge that I on behalf of Rego entered into an initial agreement with Aras for Aras to act as Rego's investment manager for amount up to RM200 million to manage and invest in various portfolio of cash …
>
> Subsequently, I acknowledge that I on behalf of Rego again entered into another supplementary agreement dated 21 April 1997 between Rego and Aras to increase the investment placement for another RM100 million to a total sum of RM300 million …
>
> Pursuant to the above agreements entered by me on behalf of Rego and in acknowledgement of receipt by Rego for the sum of RM10 to this offer, I hereby undertake in my personal capacity to make good any such losses that Rego might suffer in the event of any delay/default in payment of principal sum and expected returns deem to be accruing to Rego from Aras pursuant to the agreements entered latest by 31 March 1999.

[54] The appellant testified that he had issued the LOI as an assurance to the auditors to deal with the issue that arose over the classification of the respondent's placements with Aras Capital, as current or non-current assets. Thus, he issued the "letter of indemnity" (NOP p. 590-591). The appellant gave the LOI to assure the auditors that there could be a recoverability (NOP pp. 595-596).

[55] From the evidence adduced, the High Court found that the appellant was not coerced or forced to sign the LOI. In addition, the appellant admitted in court that based on the minutes of TRI's 80th BOD meeting in which he was the Chairman, he was liable under the LOI (NOP pp. 633-634). The High Court ruled that since the appellant was the one who gave the LOI to the respondent, only the respondent could release him from his obligations under the LOI.

[56] The High Court considered the evidence of the auditors, Habibah binti Abdul (PW6) and Wong Kang Hwee ("Wong") (PW7), from Messrs Arthur Andersen & Co. Wong did testify that during the time of 1997 and 1998, the country and corporation faced a different sort of issues never faced before. There was indeed a call by the Government to corporations and entrepreneurs to support the market place. Many companies entered into similar transactions as the one entered by the respondent. Wong could not member the details of what the respondent and TRI did. Both Wong and PWI, however, confirmed that the LOI given by the appellant, was intended to be enforceable as the auditors require more than just paper comfort to justify treating such substantial placements as current assets (NOP p. 405). In Wong's own words, "… in the course of audit, we are trying to understand why … people enter into transactions … When it comes to the recoverability bit, it's a different issue altogether. We have to look at recoverability" (NOP pp. 420-421).

[57] The High Court relied on *Artic Building and Civil Engineering Sdn Bhd v. Ahmad Zazi Sdn Bhd & Ors* [2009] 1 LNS 403; [2009] 9 MLJ 328, where at p. 350 the court said that the determination of a contract is purely a question of construction to be determined by the court.

[58] The judge is not wrong in considering another High Court decision in *Hotel Anika Sdn Bhd v. Majlis Daerah Kluang Utara* [2006] 4 CLJ 981; [2007] 1 MLJ 248 which held that the presumed intention of the parties is determined from the words adopted in the written contract.

[59] We do not think that the judge had erred in fact or in law when she found that from the plain and ordinary meaning of the LOI, it is the appellant's intention to indemnify the respondent in the event that Aras Capital defaulted in its payment by 31 March 1999. We agree with the trial judge that it is crystal clear from the words in the LOI where the appellant

expressly undertook in his personal capacity "to make good any such losses that Rego might suffer in the event of any delay/default in payment of the principal sum and expected returns deem to be accruing to Rego from Aras pursuant to the agreements entered latest by 31 March 1999".

[60] Thus, in our opinion, the High Court is correct to conclude that the LOI is not merely a comfort letter which was not intended to be binding. In fact, the learned judge found that the LOI is intended to be a legally binding and enforceable document. From the totality of the evidence adduced, the High Court is correct to find that the LOI is supported by valid consideration even though the RM10 was received by the respondent, and not by the appellant. The LOI is therefore enforceable by the respondent against the appellant.

Whether The TRI BOD Resolution Dated 23 February 2000 Has Discharged The Appellant's Obligations Under The LOI

[61] The High Court considered the following resolution made by the TRI BOD:

> 4.8 The Board after due consideration RESOLVED the following:
>
> i THAT pursuant to the Personal Guarantee of up to RM295 Million duly provided by TSTR for the payment of the Principal Amount placed by Rego with Aras and the interest accrued thereon totalling RM294.73 Million, approval be given for the Company to accept the proposed payment of RM100 Million as full and final settlement of TSTR's Personal Guarantee.
>
> ii THAT approval be given for the Company to write-off the remaining amount due from Aras of up to RM185 Million and provide for the same in the accounts of the Company for the financial year ended 31st December 1999.
>
> iii THAT in connection with the above, approval be given for the Company to waive TSTR's obligation to pay the remaining amount of RM185 Million due to Rego pursuant to the Personal Guarantee.
>
> iv THAT the Company shall proceed to recover all the amount due from Aras in respect thereof by whatever means AND THAT should the amount to be recovered exceeds the amount written off by Rego and/or the Company, approval be given for the Company to refund such excess to TSTR up to the amount of RM110 Million.

[62] From the TRI BOD Resolution, it can be seen that TRI had resolved to accept RM100 million from the appellant in addition to the RM10 million already paid by him, and to write off the balance amount due from Aras Capital. According to the appellant, this is a full and final settlement, and TRI had written off the balance outstanding.

[63] The appellant intends that the monies for the Aras Capital placement were advanced by TRI to the respondent. This was confirmed by the evidence of Dato' Bistaman Ramli (Witness Statement at Q & A 33, RR Jld 2(6) Bhg B pg 1615). Thus, when TRI agreed to the settlement and the balance amount due from Aras Capital was written off, this amount was actually written off by TRI against the respondent. The respondent in turn wrote off the amount against Aras Capital and the appellant. Further, both TRI and the respondent had made the necessary consequential provisions and adjustments in their respective Audited Accounts to reflect the settlement and the writing off of the amount due from Aras Capital.

[64] The High Court considered the appellant's submission that since TRI is 100% shareholder of the respondent, therefore the decision to settle, made by the one and only shareholder of the company, is permissible in law. However, the High Court concluded that the respondent is not bound by the TRI BOD Resolution to release the appellant of his obligations to the respondent under the LOI. The judge found that, even though there was the TRI BOD Resolution to settle the matter, there was no resolution from the respondent's own BOD to accept the proposed settlement.

[65] We are in full agreement with the judge who held that TRI, as a holding company, and its wholly-owned subsidiary company, the respondent, are separate legal entities. There is a plethora of cases which have decided that even in a group of companies, each company is a separate legal entity possessed of separate legal rights and liabilities. A board resolution of a parent or holding company cannot bind a subsidiary or wholly-owned company of that parent or holding company. Thus, the directors must approach their duties as directors who recognise the separate legal personality of the two entities. Therefore in our view, the TRI BOD Resolution does not bind the respondent (see para 2.36 of Walter Woon on *Company Law*, 3rd edn, p. 51, *Adams v. Cape Industries Plc* [1990] BCLC 479 at p. 508 and 519, *Thueringische Faser & Aktiengesellschaft Schwarza v. Bank Of Commerce (M) Berhad* [2009] 4 CLJ 102; [2008] MLJU 908, and *Lewis Holding Ltd v. Steel & Tube Holdings Ltd* [2015] 2 NZLR 83).

[66] The appellant submits that the judge overlooked that all the directors of the respondent were also directors of the TRI at the relevant time, and except for the appellant who had abstained from voting, they had resolved in favour of the Resolution of the TRI BOD. In this regard, we are of the firm opinion that notwithstanding that fact, it is still trite law that a holding company (TRI) and its subsidiary (respondent) are separate legal entities. Hence, the TRI BOD Resolution cannot bind the respondent. Therefore TRI, as the holding company, cannot simply write off the debts of its subsidiary company, the respondent, ie, for the amount due to the respondent from Aras Capital.

[67] The appellant submits that the respondent has not suffered loss since, as a result of a settlement, the holding company has written off the respondent's debts. The respondent's accounts are all adjusted and "clean", and the respondent no longer has any debt since they have all been written off by TRI. In our view, by the fact that the respondent filed this action against the two defendants, namely Aras Capital and the appellant, it is ample proof that the respondent thinks otherwise from TRI, its holding company, and seeks to recover all its losses through this claim from both defendants. As far as the respondent is concerned, the amount due from Aras Capital and the appellant was never written off, and therefore must be recovered.

The Counterclaim

[68] Regarding the appellant's counterclaim for damages, we are in full agreement with the judge that the appellant had failed to prove his counterclaim.

[69] In his counterclaim, the appellant alleged that the respondent had unlawfully allowed permitted or caused a Bursa Malaysia announcement, press statement and/or newspaper article to be published in relation to the present suit, and had used unlawful means to interfere with the trade and business of the appellant. The claim against the other defendants in the counterclaim is conspiracy with the respondent regarding the said announcement.

[70] In our view, the counterclaim was rightly dismissed by the High Court considering that the appellant opted not to give evidence on the same.

[71] Without adducing any evidence to prove his counterclaim, the appellant has no legal basis to subsequently, after the trial, proceed by way of his written submissions and inform the court the following alleged Global Settlement with the Government of Malaysia:

> In light of the Global Settlement with the Government of Malaysia, and by virtue of the fact the Plaintiff herein, Rego and TRI and Celcom are supposed to withdraw their claims, the 2nd Defendant has not pursued his Counter-claim in accordance with the agreement reached with the Government of Malaysia ("GOM"). The letters on settlement and instructions for withdrawal of the legal suits dated 8.8.2011 have been issued to all Government Linked Companies ("GLC's") including Danaharta, MAS and Telekom. Danaharta and MAS have implemented and the 2nd Defendant has withdrawn his Counter-claim in the Danaharta suit of approximately RM30billion which included Counter-claims against Telekom TRI and Celcom but the Plaintiff herein and TRI and Celcom have refused to abide by withdrawing this claim and various others claims. Please see letters issued to MAS and Telekom dated 8.8.2011 [D2CB Tab 14 and 15] respectively. Please see below for elaboration.

[72] The High Court is correct to hold that the purported Global Settlement is not part of the appellant's pleaded case. Moreover, the judge found no evidence before her of a Global Settlement. In fact, in his evidence, the appellant had admitted that there was no document signed by TRI, the respondent, or Celcom in relation to any settlement agreement.

[73] The appellant relied on a letter from the Minister in the Prime Minister's Department, addressed to Telekom Malaysia Berhad ("TMB") and to Malaysia Airlines Sdn Bhd which, *inter alia*, reads as follows:

> 2. Dengan ini dimaklumkan bahawa Kerajaan Malaysia dan Kementerian Kewangan telah bersetuju untuk menyelesaikan semua kes tuntutan sivil terhadap YBhg. Tan Sri Dato' Tajudin Ramli dan yang lain-lain ditarik dengan serta merta memandangkan pihak kerajaan dan Kementerian Kewangan bersetuju bahawa kes-kes tersebut diselesaikan di luar Mahkamah.

[74] We agree with the judge that the above letter cannot be relied upon since the appellant failed to call any witness from Ministry of Finance to verify the contents of the letter. In addition, the Government of Malaysia is not a party to these proceedings and would be in no position to effect a settlement of this matter. The respondent is a corporate entity and only it own BOD can make the decision whether to commence or continue with litigation (see *Halsbury's Laws of England*, 5th edn, 2009 Vol 14, para. 302).

[75] The judge considered the evidence of the respondents' witness, PWI, who clearly stated that there has been no settlement of any sort reached by the respondent regarding this dispute. Therefore, the judge rightly concluded that based on the evidence before her, she did not find any Global Settlement that would bind the respondent to withdraw its claims against the appellant, and which would be the foundation for the appellant not to pursue his counterclaim. Accordingly, the High Court found that the appellant has failed to establish his counterclaim on a balance of probability, and dismissed the same with costs.

Conclusion

[76] On the whole, we do not find any merit in this appeal. We are satisfied that there are no appealable errors in fact or in law which warrant our appellate intervention. We therefore dismissed the appeal on 29 November 2017, and affirmed the decision and order of the High Court. We further ordered that costs of RM15,000 be paid by the appellant to the respondent, subject to payment of the allocatur fee. The deposit is to be refunded to the appellant.